

**Letter of Findings: 04-20100552**  
**Use Tax**  
**For the Year 2007**

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**ISSUE**

**I. Use Tax – Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of use tax on an item.

**STATEMENT OF FACTS**

Taxpayer is a manufacturer of custom communications towers. The Department conducted a sales and use tax audit of Taxpayer for the years 2007, 2008, and 2009. Pursuant to the audit Taxpayer was assessed additional use tax relating to several items and tax issues. Taxpayer protested only one of the items. A hearing was held and this Letter of Findings results. Additional facts will be provided as necessary.

**I. Use Tax – Imposition.**

**DISCUSSION**

The Department's audit assessed use tax on a particular capital asset because Taxpayer could not present the underlying invoice at the time of the audit. After the audit and prior to hearing, Taxpayer presented a copy of an original contract purchase order from the capital asset vendor which includes a single dollar figure and the language "SALES TAX INCLUDED." Taxpayer presents this document to prove that sales tax was paid on the item and therefore no use tax is owed.

Although a statute that imposes a tax is strictly construed against the State, the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289, 291 (Ind. Tax Ct. 2007).

In accordance with IC § 6-2.5-2-1(a), a sales tax, known as state gross retail tax, is imposed on Indiana retail transactions unless a valid exemption is applicable. IC § 6-2.5-2-1(b) states:

The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant **as a separate added amount** to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

**(Emphasis added).**

A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2. An exemption from the use tax is granted for transactions when sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

In Lafayette Square Amoco the Tax Court stated:

As a taxpayer claiming it is not within the ambit of taxation, LSA bears the burden of proving the proposed assessment is wrong. See Clift, 748 N.E.2d at 452 (citation omitted). LSA must, therefore, present a prima facie case in order to meet its burden. See Longmire v. Indiana Dep't of State Revenue, 638 N.E.2d 894, 898 (Ind. Tax Ct.1994). A prima facie case is one in which the evidence is "sufficient to establish a given fact and which if not contradicted will remain sufficient." Id. (internal citation omitted). LSA, however, has failed to meet that burden.

Id. at 292.

The Tax Court found that the taxpayer in Lafayette Square Amoco did not meet its burden of demonstrating that it had charged and collected sales tax because it did not have underlying invoices for the transactions at issue and was therefore unable to prove that the tax was collected as a separately added charge. Id.

This protest presents a similar case. The vendor in this case should not subsume the sales tax into its total price, the sales tax amount should always be stated separately. However, even assuming that the vendor's purchase order price did include sales tax, there is still no guarantee, absent an actual invoice, that sales tax was actually paid upon completion of the transaction. As per Lafayette Square Amoco, without the underlying invoice, Taxpayer has not met its burden to show that it paid sales tax. Therefore, the Department's assessment of use tax on this item stands.

**FINDING**

Taxpayer's protest of the assessment of use tax on the contested item is respectfully denied.

